TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

HON. DOUGLAS L. FLEMING, JR., CHIEF JUDGE
HON. STEPHEN E. SINCAVAGE
HON. JEANETTE A. IRBY
HON. JAMES P. FISHER
HON. JAMES E. PLOWMAN, JR.
JUDGES

Loudoun, Fauquier and
Rappahannock Counties
Post Office Box 470
Leesburg, Virginia 20178

HON. W. SHORE ROBERTSON
HON. JAMES H. CHAMBLIN
HON. THOMAS D. HORNE
HON. BURKE F. MCCAHILL
HON. JEFFREY W. PARKER
RETIRED JUDGES

28 December 2022

Zachary G. Williams, Esq.
Venable LLP
8010 Towers Crescent Drive, Suite 300
Tysons, Virginia 22182
Counsel for Plaintiff

Stephen C. Price
McCandlish &Lillard, PC
201 Loudoun Street SE, Suite 201
Leesburg, Virginia 20175
Counsel for Defendants Courtland Farm Conservancy Lots Homeowners Association, Inc., The Dorgham Group, LLC, Christopher Grady, Aimee Grady, John Thomas Curtis, Debra P. Curtis, Zachary Casagrande, Gena Casagrande, Donald M. Berlin and Kimberly L. Berlin, Raymond Roberts and Thanh Quach, Trustees of the RRTQ Joint Revocable Trust

In re: Cliff Thomas v. Courtland Farm Conservancy Lots Homeowners, Association, Inc., *et al.*
Case No. CL-119413

Dear Counsel:

The matters before the Court are two pleas in bar filed against Plaintiff's complaint for quiet title, declaratory judgment, and injunction. The Court finds that the pleas were timely filed based on the Order entered by the Honorable Judge Thomas D. Horne on November 21, 2019.

After hearing testimony and oral argument on June 15, 2022, the Court directed counsel to file a copy of a transcript of the proceedings and took the pleas in bar under advisement. The Court thanks counsel for their presentations and appreciates the patience of counsel and the

parties in this matter while the was under advisement. The demands of the Court's caseload create challenges in giving every case its due time and attention.

The following ruling is based upon consideration of the pleadings, testimony, briefs, oral argument, and applicable law.

Defendants The Dorgham Group, LLC ("Dorgham") and Donald and Kimberly Berlin posit in a plea in bar ("plea in bar #1") that the complaint arising out of the March 19, 2005 (purportedly efficacious) execution of an Amendment to the 1997 Declaration of Protective Covenants governing conservancy lots in the Courtland Farm Rural Village ("2005 Amendment") is barred due to laches, as the complaint herein was not filed until January 22, 2019.

A group of Defendants (Dorgham, the Berlins, Christopher and Aimee Grady, John and Debra Curtis, Zachary and Gena Casagrande, and the Courtland Farm Conservancy Lots Homeowners Association, Inc.) posit in a plea in bar ("plea in bar #2") that the object of the complaint, i.e., reformation of the 2005 Amendment, would result in violations of the Loudoun County zoning ordinances. They claim, therefore, that the claim is barred.

A plea in bar reduces the litigation to a single issue, that, if proven, bars the plaintiff's right of recovery. Robinson v. Nordquist, 297 Va. 503, 513 (2019); Hawthorne v. VanMarter, 279 Va. 566, 577 (2010). The party asserting a plea in bar bears the burden of proof on the issue presented. Baker v. Poolservice Co., 272 Va. 677, 688 (2006).

The parties differ on the threshold issue of what information is available to the Court in deciding the pleas in bar. The Defendants suggests that the Court is limited to the following in considering the pleas in bar:

1. the allegations in the complaint that were admitted;

2. the exhibits admitted into evidence at the plea in bar hearing;

3. the testimony of Mr. Dorgham; and

4. the testimony of Mr. Berlin.

Defendants take this position in contradiction to Plaintiff's assertion that "all facts plead in the complaint are taken as true." (There is no apparent controversy that items 2, 3, and 4 are properly considered by the Court.) Defendants assert that the rule "that all allegations in the complaint are taken as true only applies if not evidence is offered." The Defendants invited the Court to "review the authority on that," although neither party directed the Court to specific authority in support of its position on this question under the circumstances presented.

It is clearly established in Virginia that "[w]here no evidence is taken in support of a plea in bar, the trial court, and the appellate court upon review, consider solely the pleadings in resolving the issue presented." Lee v. City of Norfolk, 281 Va. 423, 427 (2011), citing Lostrangio v.

Laingford, 261 Va. 495, 497 (2001). This holding, however, is not on point with Defendants' position that when evidence is presented at a hearing on a plea in bar, only the evidence taken at the hearing is properly considered. (The Court notes that the Defendants offered as evidence the allegations in the complaint that were admitted.) Defendants posit, in essence, that upon the introduction of any evidence, no allegation Plaintiff's complaint is taken as true.

The well-established rule from Lee dictates how the pleadings are to be considered when evidence *is not taken* but does not dictate how the pleadings are to be considered when evidence *is taken*. The Court is not aware of authority that would categorically preclude the Court's consideration of allegations in a complaint just because evidence is introduced at a plea in bar hearing.

In California Condominium Assoc. v. Peterson, 301 Va. 14 (2022), the Supreme Court of Virginia obliquely addressed this issue. The following passage is found in the opinion:

> "A typical trial, after all, is not an all-or-nothing exercise: all fact and no law or all law and no fact. It can be either or both depending on the nature of the dispute. The same is true of a pretrial evidentiary hearing on a plea in bar. Simply holding an evidentiary hearing does not convert all of the arguments for and against the plea in bar into factual disputes. An argument asserting a purely legal bar to the pleaded facts, assumed arguendo to be true, can be and should be decided in that manner — so, too, should a purely legal rejoinder to an argument offered in support of a plea in bar. The circuit court, therefore, erred in refusing to consider the Association's argument concerning the conveyance provision of the Declaration because it was not admitted into evidence at the ore tenus hearing."

The trial court was reversed because it did not consider an exhibit that was mentioned in the pertinent amended complaint, which, for purposes of the plea in bar, the defendant in California Condominium Assoc. v. Peterson assumed the truth of without admitting.

As applied to the instant case, such a holding compels the Court to consider as true for purposes of these pleas in bar those allegations which Defendant has admitted, whether or not those were admitted into evidence. (It is again noted that the admitted allegations were put into evidence by Defendant at the hearing on the plea in bar.)

California Condominium Assoc. v. Peterson sheds no light, however, on what appears to be controverted between the parties in this matter – whether allegations in a complaint that a defendant has not admitted or assumed as true for purposes of a plea in bar hearing are automatically excluded from being taken as true once evidence is presented at a plea in bar hearing.

Ultimately, the Court finds that its rulings on the pleas in bar do not depend on a resolution of that controversy.

Plea in Bar #1

In consideration of plea in bar #1, the Court assumes, without deciding, that the law requires that no allegations in the complaint except those admitted are taken as true because evidence was admitted at the plea in bar hearing. This assumption is consistent with Defendants' position.

Defendants Dorgham and Berlin have asserted a plea in bar on the basis of laches. These Defendants argue that neither the original parties to the instrument, nor the original parties to the underlying agreement, ever sought reformation of the 2005 Amendment prior to the January 22, 2019, filing of the instant lawsuit. Accordingly, Dorgham and Berlin assert that Plaintiff and its predecessors in interest are guilty of laches.

Laches is a time-bar to the prosecution of equitable claims. May v. R.A. Yancey Lumber Corp., 297 Va. 1, 18 (2019). It is a "defense against equitable claims where the plaintiff fails 'to assert a known right or claim for an unexplained period of time under circumstances prejudicial to the adverse party.'" May, 297 Va. at 18 (quoting Stewart v. Lady, 251 Va. 106, 114 (1996)). There are two elements to the defense of laches, (1) an adult plaintiff has unreasonably delayed asserting his or her rights, and (2) the delay has been prejudicial to the defendant. Kent Sinclair, *Sinclair on Virginia Remedies* § 43-2[A] (5th Ed. 2016).

The party asserting laches carries the burden of proof. May, 297 Va. at 18 (quoting Stewart, 251 Va. at 114).

In consideration of the "unreasonable delay" element of laches, Defendants cite Washington v. Prasad, 292 Va. 658, 663-64 (2016), in contending that a purchaser, such as Plaintiff here, is bound, not only by actual, but also by constructive notice, which is the same in its effect as actual notice, of provisions of a title. The suggestion is that Plaintiff and or a predecessor in title was on notice of signature defects in the 2005 Amendment as early as its purported execution. Prasad remains good law, but the Court finds that the facts underlying Prasad are distinguishable from those of the instant controversy.

In elucidating its ruling in Prasad, the Virginia Supreme Court cited Burwell v. Fauber, 62 Va. (21 Gratt.) 446, 464 (1871), for the proposition that the purchaser "must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him." Prasad at 663.

Where Plaintiff is charged, upon looking to the title papers, with notice of "all facts appearing upon their face," he is not, by this Court's interpretation, charged with notice of facts

that do not appear upon the face of the papers, unless the facts appearing on the face of the papers "conduct" Plaintiff to any fact or facts that do not appear on the face of the papers.

The Court interprets the language from Prasad to mean that if (and only if) any fact or facts on the face of the papers reasonably lead the Plaintiff to facts external to the papers, then Plaintiff is charged with notice of those external facts. This interpretation is informed by the following passage from Prasad, 292 Va. At 663: "no principle is better established than that a purchaser must look to every part of the title which is essential to its validity. The law requires **reasonable diligence** (emphasis added) in a purchaser to ascertain a defect of title (citing Burwell v. Fauber, 62 Va. (21 Gratt.) 446, 464 (1871) (quoting Brush v. Ware, 40 U.S. 93, 111 (1841)))".

Unlike Prasad, where diligent review of the pertinent document reveals the fact pertinent to the controversy (the true location of Prasad's parcel), diligent review of the 2005 Amendment (attached as Exhibit 4 in paragraph 51 of the complaint, which Defendants admitted) does not reveal the facts pertinent to the instant controversy (that the inclusion of Courtland Farms Loudoun, LLC in the document was erroneous and that the omissions of Goosecreek Waterfowl and/or Courtland Farm LLC from the document were erroneous).

The Court therefore finds that the holding in Prasad does not compel the Court to charge Plaintiff, or any predecessor in title with constructive notice of error in the 2005 Amendment as of its execution. Further, the Court finds that Defendants have not established that Plaintiff or any predecessor in title had actual knowledge of such prior to the spring of 2016 when the Loudoun County Department of Planning and Zoning notified Plaintiff (and other property owners) that he was in violation.

Accordingly, the Court finds that Defendants have not established that any date prior to May 6, 2016, is properly used for purposes of considering whether Plaintiff unreasonably delayed asserting his rights. In the June 17, 2016, Notice of Violation (admitted as Exhibit 4), there is reference to a "letter sent by staff" dated May 6, 2016, which indicated that the County required documentation from Plaintiff of the establishment of a valid homeowners' association and that Plaintiff was a member thereof to come into compliance with pertinent proffers and section 4-1217 of the Loudoun County Zoning Ordinance.

The complaint in this matter was filed on January 22, 2019. The Defendants have certainly established delay by Plaintiff in asserting his rights, by not filing suit until 32 months after the Notice of Violation was issued. However, it is Defendants' burden to establish that the delay was unreasonable.

There is no legal presumption that a 32-month delay is unreasonable. It is manifest, therefore, that circumstances may exist that make such a delay reasonable. The evidence does not

establish any fact or circumstance or combination of facts and circumstances that would allow the Court to find that Plaintiff's delay was unreasonable. To conclude that Plaintiff's delay was without reason would be speculation, in which the Court does not engage. The Court finds that Defendants have not met their burden in establishing unreasonable delay. Because Defendants have failed to establish one of the two necessary elements of laches, the Court finds it proper to order that plea in bar #1 is overruled.

Plea in Bar #2

In consideration of plea in bar #2, the Court assumes, without deciding, that the law requires the allegations in the complaint are taken as true notwithstanding the admission of evidence at the plea in bar hearing. This assumption is consistent with Plaintiff's position.

In pursuing reformation of the 2005 Amendment, Plaintiff seeks to "remove the restrictive covenants from the larger Conservancy Lots comprised of 100 or more acres, which includes Plaintiff's lot." Among the restrictive covenants that would be removed is that which required the conservancy lots to be governed by a property owner's association. Were Plaintiff successful in his claim, the express terms of the 2005 would remove Lots 1, 2, 3, 4-A (Plaintiff's lot) and 5-A from the definition of "lot" in the Declaration and remove the owners of such lots from the definition of "owners" in the Declaration.

Defendants claim that the granting of such relief would cause violation of the Loudoun County ordinance, and that, therefore, Plaintiff should be barred from seeking such relief from the Court. The Court agrees with Defendants.

At its core, the function of the courts is to obey the law. "It is a well settled principle of law that the courts will not aid a party to enforce an agreement made in furtherance of objects forbidden by the statutes, or by common law, or general policy of law." Massie v. Dudley, 173 Va. 42, 52 (1939).

The Virginia Supreme Court has further held (quoting McMullen v. Hoffman, 174 U.S. 639, 654, 699 (1899)) "the authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.'" Colbert v. Ashland Const. Co., 176 Va. 500, 505 (1940). A longstanding rule in Virginia is "when the law prohibits a thing, it is unlawful to do it, and the courts should not lend their aid to the enforcement of prohibited contracts. Courts are established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts made in violation of law." Colbert at 176 Va. at 509.

In Massie, the Virginia Supreme Court declined to enforce a contract wherein a representative who did not hold a real estate license claimed a fee for arranging the sale of property. Noting that there are statutes which regulate the real estate business, which are designed to protect

the public from fraud, misrepresentation and dishonesty, the Virginia Supreme Court held that the agreement was illegal, not merely invalid, and void as contrary to a positive statute enacted under police power and to public policy. See Massie,173 Va. at 51-55. In Colbert, which relied on Massie, the Virginia Supreme Court held that a contractor who was unlicensed in violation of statute was unable to recover fees in contract for work performed. Colbert, 176 Va. at 506.

Virginia has long held that zoning is a valid exercise of the police power of the Commonwealth. Cochran v. Fairfax County Bd. Of Zoning Appeals, 267 Va. 756, 764 (2004) (citing West Brothers Brick Co. v. Alexandria, 169 Va. 271, 281 (1937)). So, pursuant to the reasoning in Massie, an amendment to restrictive covenants that facilitates, if not dictates, a violation of a zoning ordinances is void as contrary to a lawfully enacted ordinance.

Review of the Loudoun County Zoning Ordinance reveals that Section 4-1217 of the Loudoun County Zoning Ordinance would be violated were the 2005 Amendment to be reformed. Reformation of the 2005 Amendment would leave lots 1, 2, 3, 4-A, and 5-A without governance by a homeowner's association as required by 4-1217, and subject owners of the subject lots to civil and potentially criminal penalties.

The Court therefore finds that plea in bar #2 is well-taken and orders it sustained.

Let Mr. Price draft an order consistent with and incorporating the ruling in this letter opinion. The order shall be circulated and endorsed by counsel with exceptions noted thereon and submitted to the Court for entry.

Very truly yours,

Stephen E. Sincavage
Judge

cc: Garth M. Wainman, Esq.
Matthew A. Westover, Esq.
4319 Prince William Parkway, Suite 300
Prince William, Virginia 22192
Counsel for Court-Loudoun LLC

J. Chapman Petersen, Esq.
David L. Amos, Esq.
Chap Petersen & Associates, PLC
3790 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Potomac Mortgage Group, Inc., Harry Dean III & Frederick E. Brooks, Trustees

Goosecreek Waterfowl, LLC
c/o Linda Rupi, Registered Agent
6627 Holland Street
McLean, Virginia 22101